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No. 04-

IN THE

Supreme Court of the United States

LOGAN L. NICHOLS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Federal Sentencing Guidelines apply to this case, considering the conflict between appellate courts, and whether this petition should be held until the Court resolves the conflict.

2. If the Federal Sentencing Guidelines are applicable, whether civil money penalties previously paid by a defendant should be considered a "forfeiture," and, if so, whether such a "forfeiture" can be used as a proper basis for a downward departure.

3. If the Federal Sentencing Guidelines are applicable, whether, in addition to the previously paid civil money penalties, the good works, character, abberational nature of the conduct, and disparity in sentence between co-defendants are sufficient to justify a downward departure.

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Logan L. Nichols, through his counsel, petitions for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-8a) is reported at 376 F.3d 440, *rehearing denied, rehearing en banc denied* (App., *infra*, 21a-22a). The judgment and opinion of the district court are unreported. Excerpts from sentencing colloquy of the district court are set forth at App., *infra*, 9a-20a.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on July 2, 2004. On August 18, 2004, the court of appeal denied petitioner's application for rehearing and for rehearing en banc. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The basis for federal jurisdiction in the Court of first instance is 18 U.S.C. § 3231.

1. The underlying facts.

Nichols and three co-defendants were charged with one count of conspiracy under 18 U.S.C. § 371 to violate Federal insider trading laws. Nichols and the other three defendants all entered a guilty plea on the same day that the bill of information was filed. Nichols had acted on two separate tips from a co-defendant. This co-defendant also tipped the other two co-defendants.

Nichols, prior to sentencing, had severe civil sanctions imposed upon him based on the underlying offense. The Securities and Exchange Commission filed a complaint in the United States District Court for the Southern District of Texas. Simultaneous with the filing of the complaint a consent judgment was entered requiring Nichols to disgorge profits of $268,368.75, plus pay interest of $83,268.26, together with a civil penalty of $443,140.00, or a total of $794,777.01.

Nichols had an excellent reputation in the community and an outstanding record of caring and giving to those in need, to those less fortunate than himself, usually without any attempt or thought of recognition for himself, all as shown by the letters, certificate and other information attached to the sealed pre-sentencing memorandum entered into the record.

Nichols is an attorney. He notified the Louisiana Attorney Disciplinary Board of the entry of his guilty plea and consented to and signed a petition for interim suspension from the practice of law. At the time of sentencing, the Louisiana Supreme Court had under consideration whether to disbar Nichols from the practice of law based on the instant conviction.

Nichols had no prior criminal record and was a law abiding citizen prior to the instant offense.

2. The district court proceedings.

Nichols pled guilty to one count of conspiracy to violate insider trading laws.

Nichols at his guilty plea admitted to a profit of $230,475.00 from the tips. The co-defendant who tipped Nichols and the other two defendants' sentencing guidelines application would have included Nichols' profits as well as profits made up by the other two defendants. The co-defendant received a motion from the Government for a 5K1.1 downward departure.

The trial court arrived at a total offense level of 13 in a criminal history of I based on the 1997 guidelines. The guideline range was 12 to 18 months imprisonment and a fine range of $3,000.00 to $30,000.00. The district court sentenced Nichols to five years probation, 12 months of home confinement with electronic monitoring, 500 hours of community service and ordered that he pay the $100 special assessment. The district court departed downward based on all of the information provided to him by the defendant and on the totality of the circumstances. The district court specifically articulated three reasons for the downward departure: The imposition of other sanctions, including the "disgorgement" of almost $800,000.00 by Nichols in a previous civil matter filed by the Securities and Exchange Commission; the good citizenship and good deeds of Nichols; and the disparity in sentences that Nichols would receive as opposed to the co-defendants (including the senior vice president who was at the hub of the conspiracy) if he did not depart downward to arrive at Nichols' sentence (App., *infra,* 15a-20a).

3. Proceedings on appeal.

The Government timely appealed the sentence of the district court. The Fifth Circuit opinion vacated the district court's sentence and remanded for resentencing based on its

finding that the district court did not apply and articulate a legal basis for the downward departure. Nichols' application for rehearing and rehearing *en banc* was denied. Nichols now petitions the Court to grant a writ of certiorari to the Fifth Circuit.

REASONS FOR GRANTING THE PETITION

BLAKELY ISSUE

This Court's decision in *Blakely v. Washington,* 124 S. Ct. 2531 (2004) applied the rule of *Apprendi v. New Jersey,* 530 U.S. 466, 490 (2000) to hold that, other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. *Blakely* declared that the State of Washington's sentencing procedure (which is very much akin to the procedure set forth in the United States Sentencing Guidelines) was unconstitutional under the Sixth Amendment right to jury trial, at least insofar as upward departures are concerned. The Court noted in Footnote 9 that the Federal Guidelines were not before the Court and therefore expressed no opinion as to them. The Court stated that the case was not about whether determinate sentencing is constitutional, but only about how it could be implemented in a way that respects the Sixth Amendment.

Since *Blakely* was decided, the Fifth Circuit, in *United States v. Pineiro,* 377 F.3d 464 (5th Cir. 2004) 2004 WL 1543170, acknowledged that "*Blakely* strikes hard at the prevailing understanding of the guidelines" and "the potential transience of our decision," and hoped that "the question presented in cases like this one will soon receive a more

definitive answer from the Supreme Court, which can resolve the current state of flux and uncertainty." The *Pineiro* panel nonetheless ruled that *Blakely* does not apply to the Federal Sentencing Guidelines.

The Seventh Circuit in *United States v. Booker,* 375 F.3d 508 (7th Cir. 7/09/2004), 2004 WL 1535858 held that *Blakely* does, in fact, apply to the Federal Sentencing Guidelines. Therefore, there is a split in the decisions of the Fifth and Seventh Circuits.

Petitions for writ of certiorari have been filed with the Court in both *Pineiro* (No. 04-5263) and *Booker* (No. 04-104).

The United States has filed a petition for writ of certiorari in *United States v. Fanfan,* 2004 WL 1627262 (U.S., Jul 21, 2004) (NO. 04-105) which was before the First Circuit Court of Appeal as No. 04-1946. In *Fanfan,* the district court held that *Blakely* applied to the Federal Sentencing Guidelines and refused to apply guideline enhancements to *Fanfan's* sentence. The First Circuit had yet to rule before the Government's petition for writ of certiorari was filed.

At least two district courts, *United States v. Shamblin,* 323 F. Supp. 2d 757 (S.D. W.Va. 6/30/2004), 2004 WL 1468561 and *United States v. Montgomery,* 324 F. Supp. 2d 1266 (D. Utah 7/8/2004), 2004 WL 1535646 have also held that *Blakely* applies to the Federal Sentencing Guidelines.

Additionally, at least one lower court, *United States v. Croxford*, 324 F. Supp. 2d 1230 (D. Utah, 2004) has held that the entire Federal Sentencing Guidelines are unconstitutional in light of *Blakely* because the

unconstitutional parts of the sentencing scheme (i.e. unconstitutional enhancements) cannot be severed from the other sections of the scheme since the Sentencing Reform Act of 1984 contains no severability clause. Also, in the pre-*Blakely* case of *United States v. Green*, 2004 WL 1381101, No. 02-10054-WGY (D. Mass. 6/18/2004) the Chief Judge of the Massachusetts Court found the guidelines violate the Constitution.

As the Government stated in its Petition for Writ of Certiorari in *Fanfan*, *Blakely* has "profoundly unsettled the Federal criminal justice system." The Government has asked that the *Booker* and *Fanfan* reviews be made on an expedited basis "because of the singular importance of the questions presented for review in those cases and the urgent need for their prompt resolution." In addition, the Second Circuit has taken the rarely used certification process to seek guidance from the Supreme Court as to whether *Blakely* applies to the Federal Sentencing Guidelines. *United States v. Penaranda,* 375 F.3d 238, 2004 WL 1551369 (2nd Cir. 7/12/2004) (Supreme Court Docket No. 04-59).

The Fifth Circuit, in its ruling vacating Nichols' sentence, applied the Federal Sentencing Guidelines.

While Nichols has not previously asserted the unconstitutionality of the Federal Guidelines as *Blakely* was decided after briefing and argument to the Fifth Circuit and cannot do so now in this Petition, the Supreme Court's resolution of the cases now pending before it will govern the disposition of this case. Therefore, this Petition should be held pending the decision or decisions in *Pineiro, Booker, Fanfan* and *Penaranda,* and then disposed of in light of those decisions.

FORFEITURE ISSUES

United States Sentencing Guideline 5K.2.0 empowers a sentencing court to depart downward from the sentencing guideline range, otherwise specified for a defendant if the defendant has exhibited "extraordinary" acceptance of responsibility for his misconduct. In an analogous case, *United States v. Davis,* 797 F. Supp 672 (N.D. Indiana 1992), the court found that a departure from the guideline range was warranted because the defendant's acceptance of responsibility was present to a degree substantially in excess of that which ordinarily is involved in the offense of conviction by paying an extensive amount in restitution. Before being indicted in that case as a result of a voluntary settlement in a civil lawsuit, the defendant paid $800,000 in restitution. The court found that such a large amount of prepaid restitution was a circumstance that was high unusual and this extraordinary amount of restitution constitutes such an acceptance of responsibility as to warrant departure. *Id.* at 677.

The appeals court ruling below held that civil forfeiture is an impermissible factor on which to base a downward departure. This is an important question of Federal law that has not been, but should be, settled by this Court. There is also a conflict between the Circuits as pointed out below. The appeals court cited rulings from the Third, Fourth, Seventh, Ninth and Eleventh Circuits that likewise held that civil forfeiture may not be used as basis for departure from the sentencing guidelines. Even if one assumes that forfeiture may never be taken into consideration for a downward departure, the appeals court misapprehended the facts in this case as to the nature of the monies previously and voluntarily paid by Nichols as a result of a consent judgment with the

Securities and Exchange Commission. As the District Court stated in its Oral Reasons for Ruling, "Nichols paid $794,777.01 in penalties and disgorgement and interest to the Government. This is a significant amount of money over and above any profit that he did receive in this matter" (App., *infra,* 16a). As information presented to the sentencing court indicated, $268,368.75 of this was disgorgement of profits, $83,268.26 was interest and the balance of $443,140.00 was a civil penalty. In fact, as the Court noted, this was several times the amount of profit made by Nichols (App., *infra,* 12a).

The Government even acknowledged at sentencing that the guidelines do not take into consideration the "disgorgement" of money paid by Nichols (App., *infra,* 12a) and that such "disgorgement" should be considered by the sentencing court in determining the appropriate sentence (App., *infra,* 13a, 15a).

At issue here is whether the amounts paid in "disgorgement" as they were called by the District Court, were, in fact, forfeiture or rather, at least partially, extraordinary restitution, which can and should be grounds for a downward departure. According to the Consent Judgment in the Securities and Exchange Commissions ("SEC") suit against Nichols, the $268,368.75 disgorgement specifically represented the profits gained by Nichols as a result of the conduct alleged in the Complaint. This conduct was the same conduct that resulted in the plea of guilty in the instant case. Nichols also paid pre-judgment interest in the amount of $83,268.26. In addition, as Nichols agreed, he paid a civil penalty of $443,140.00 pursuant to Section 21(d)(3) of the Securities Exchange Act of 1934, 15 U.S.C. § 78u(d)(3). As the Fourth Circuit stated in *United States v.*

Weinberger, 91 F.3d 642, 644 (4th Cir. 1996): "Forfeiture actions signify that a defendant possessed contraband or property derived from unlawful activity." In Nichols' case, a distinction should be made between the property derived from the unlawful activity, i.e., the $268,368.75 which represented the profits gained as a result of the unlawful activity, from the pre-judgment interest of $83,268.26 and from the civil penalty of $443,140.00. Those amounts are obviously over and above any property that Nichols received as a result of his unlawful activity. Nichols did not just forfeit the proceeds of his criminal activity but paid an additional amount to the SEC of more than double the amount of any profit. This amount, at the least should not be considered a "forfeiture."

Additionally, the cases relied upon by the Fifth Circuit in declaring that forfeiture cannot be proper grounds for a downward departure can be distinguished from the facts in this case. In *United States v. Shirk,* 981 F.2d 1382, 1397 (3rd Cir. 1992), the defendant was convicted of structuring in violation of 31 U.S.C. § 5324(c) and 31 U.S.C. § 5322(b). The forfeiture in question was stipulated to in the criminal case as part of the overall plea. In *United States v. Hendrickson,* 22 F.3d 170, 175-176 (7th Cir. 1994), the defendant was subject to mandatory forfeiture of property because he pled guilty to money laundering under the provisions of 18 U.S.C. § 982(a)(1) and 18 U.S.C. § 982(b)(2). The *Hendrickson* court also found that voluntary payment of restitution may be a proper basis for finding extraordinary acceptance of responsibility, but that the payment of a statutory forfeiture was not the proper basis for such a finding, *Id.* at 176, citing *United States v. Garlich,* 951 F.2d 161 (8th Cir. 1991) and *United States v. Davis,* 672 F. Supp. at 676-77. In *United States v. Crook,* 9 F.3d

1422 (9th Cir. 1993) the defendant forfeited his home under the Controlled Substances Act because the property was used to manufacture marijuana. Also, this forfeiture was done pursuant to a plea agreement. *United States v. Hoffer,* 129 F.3d 1196 (11th Cir. 1997) was also a federal drug offense where in a plea agreement the defendant agreed not to contest the governmental civil forfeiture action seeking $50,000.00.

The cases cited and relied upon by the appeals court were either mandatory forfeiture cases or forfeitures pursuant to a plea agreement. The monetary penalties paid by Nichols under 15 U.S.C. § 78u(d)(3) are not mandatory. None of the monies paid by Nichols were paid pursuant to his plea but paid voluntarily pursuant to a Consent Judgment with the SEC.

Nichols urges this Court to adopt the rule in the Eighth Circuit that a sentencing judge may depart downward from the sentencing guidelines in unusual circumstances such as extraordinary restitution. *United States v. Condelee,* No. 91-2032 (8th Cir. 1992), 961 F.2d 1351, 1353.

Nichols urges this Court to adopt a rule that interest and penalties previously paid in a civil resolution with the SEC are not a "forfeiture" in an insider trading criminal matter and thus can be considered in determining whether a downward departure is warranted.

GOOD CITIZEN ISSUE

The appeals court decision essentially glossed over the factor mentioned by the trial court in his colloquy, that Nichols had been an upstanding citizen (App., *infra,* 16a-17a). The appeals court found that since it could not be

discerned from the sentencing colloquy whether exceptional circumstances existed because the district court did not elaborate on Nichols' civic good works or community ties.

Other courts have ruled that exemplary community service, *United States v. Schaffer*, 121 F. Supp. 2d 29, 34 (D.D.C. 2000), *vacated*, 240 F.3d 35 (D.C. Cir. 2001) and acceptance of responsibility coupled with family and community ties may be considered if unusual circumstances are present, *In re Sealed Case*, 292 F.3d 913, 917 (D.C. Cir. 2002). The Fifth Circuit itself has ruled that cultural assimilation may be basis for downward departure. *United States v. Rodrigues – Montelonzgo*, 263 F.3d 429, 433 (5th Cir. 2001).

Additionally, the appeals court did not properly consider Nichols' argument that the sentencing guidelines expressly authorized the Court to take into account the "aberrant" nature of defendant's conduct in imposing a sentence. U.S. Sentencing Guidelines, Chapter 1, Part A, Introduction Comment (4) (d). A defendant's misconduct is aberrant when it appears to be "isolated and so out of character" with the rest of defendant's life behavior. *United States v. Pina,* 930 F.2d 1486, 1495 (10th Cir. 1991); *United States v. Gamez,* 1 F. Supp.2d 176, 184 (E.D. NY 1998); *United States v. Blackwell,* 897 F. Supp. 588 (D. DC 1995). The appeals court should have addressed whether the actions underlying the offense were so completely out of the normal behavior pattern of this particular defendant and so extremely unlikely to happen again that a downward departure would be justified.

DISCREPANCY IN SENTENCING ISSUE

The appeals court opinion indicated that the disparity in sentences between Nichols and his co-defendants was a "justified" disparity using the analysis set forth by Seventh Circuit in *United States v. Meza,* 127 F.3d 545, 549 (7th Cir. 1997). The ruling stated that a justified departure is one where a 5K1.1 downward adjustment is made as a result of the Government's motion based on cooperation. This decision is in conflict with other circuits as indicated below.

The trial court has the discretion to consider disparity in sentencing between co-defendants, *United States v. Wright,* 211 F.3d 233, 239 (5th Cir. 2000). The trial court should also have the discretion to gauge whether the Government's motion is "justified" and, indeed, any degree of cooperation with the Government, if any, in order to arrive at a proper sentence for all of the defendants. For example, if a defendant refuses to plead guilty unless he receives the Government's agreement to provide a 5K1.1 motion for downward departure, but the defendant then does nothing to assist the Government, should not the trial judge be allowed to take that into consideration as a factor in arriving at the proper sentence for co-defendants? In fact, the sentencing court took into consideration the fact that a more culpable defendant received a lesser sentence than one that Nichols might have received without a downward departure (App., *infra,* 17a). If the central person in a conspiracy would have normally received a longer sentence but for the Government's motion, should not the trial judge be able to balance out the sentences to arrive at fair and justifiable sentences as the sentencing judge wanted to do in *Wright* but believed he could not? Such

situations are clearly outside the "heartland" of situations described in *Koon v. United States*, 518 U.S. 81 (1996). Such a situation exists in this case as well.

Other circuits have also ruled that sentencing courts may consider co-defendants sentences when considering whether to confirm the defendant's sentence to that of his co-defendants. *United States v. Bonner*, 313 F.3d 110, 112 (2nd Cir. 2002); *United States v. Reed*, 264 F.3d 640, 649 (6th Cir. 2001), *rehearing en banc denied, cert. denied*, 122 S. Ct. 1374, 535 U.S. 962 152 L. Ed. 2d 366.

This Court should adopt a rule that disparity in sentencing between co-defendants may be used by the sentencing court, in its discretion, to depart downward from the Federal Sentencing Guidelines.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED JULY 2, 2004

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 03-31133

UNITED STATES OF AMERICA,

Plaintiff - Appellant,

versus

LOGAN L. NICHOLS,

Defendant - Appellee.

Appeal from the United States District Court
for the Western District of Louisiana

Before JOLLY, DAVIS and JONES, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

Logan L. Nichols pled guilty to one charge of insider trading. The district court imposed a sentence that downwardly departed from the applicable sentencing guidelines. Because the district court did not apply and articulate a legal basis for the downward departure, we VACATE the sentence and REMAND for resentencing.

Appendix A

I

Logan L. Nichols and three co-defendants were charged with insider trading under 18 U.S.C. § 371, and Nichols entered a guilty plea. Nichols had acted on two separate tips from the senior vice president of USA Waste Services, Inc., regarding the acquisition of one company and the later merger with a second company. Nichols made a total of $230,475 profit on these tips. He also passed the tips on to several friends, who also profited.

Relying on the 1997 guidelines, the Presentencing Report ("PSR") calculated a total offense level of 13 and a criminal history category of I.[1] The guideline range was 12-18 months imprisonment and a fine range of $3,000 to $30,000. Moreover, the guidelines categorized this as a "Zone D" sentence, which requires some term of imprisonment. The district court sentenced Nichols to five years probation, twelve months of which were to be served in home confinement with electronic monitoring, 500 hours of community service, and ordered that he pay the $100 special assessment. The court declined to impose an additional fine.

The district court departed downward for three reasons that it detailed orally, which we will later discuss. The district court did not issue a written statement of reasons. The government filed a timely notice of appeal of the downward departure under 18 U.S.C. § 3742(b).

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1. Specifically, the base offense level was 8 per U.S.S.G. § 2F1.2, eight levels were added due to Nichols's gain of $230,475 per U.S.S.G. § 2F1.2(b)(2), and three levels were subtracted for acceptance of responsibility per U.S.S.G. § 3E1.1.

Appendix A

II

The district court is required to "state in open court the reasons for its imposition of the particular sentence" and, if a departure from the applicable sentencing guideline range is involved, "the specific reason" for the departure, which "must also be stated with specificity in the written order of judgment." 18 U.S.C. § 3553(c)(2). Because the district court here failed to provide the written statement of reasons, we review its sentencing order *de novo.* 18 U.S.C. § 3742(e).[2]

A district court must impose a sentence within the guideline range "unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b) (2000). Here, the district court referred to three factors that it believed justified the imposition of a lesser sentence.

First, the district court considered Nichols's significant "disgorgement" to the SEC as the result of a civil forfeiture action. The court qualified its reliance on this factor, however, by noting that it would consider this factor not for purposes of the downward departure, but in the totality of the circumstances. Thus, this factor's role in the departure decision is unclear.

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2. Nichols's argument that the abuse of discretion standard applies to this case is wholly without merit in the light of the PROTECT Act's mandate. Pub. L. 108-21, 117 Stat. 650 (2003), (amending, *inter alia*, 18 U.S.C. § 3553(c) and § 3742(e)). Nichols's sentence was not imposed, and the instant appeal was not filed, until after the Act's effective date (April 30, 2003).

Appendix A

This Court has not addressed whether a district court may rely on a civil forfeiture when deciding whether to depart downward. Under *Koon v. United States*, 518 U.S. 81 (1996), the first question must be whether a factor is "discouraged" or "prohibited" under the sentencing guidelines. Section 5K2.0, relying on section 3553(b), states that

> an offender characteristic or other circumstance that is *not ordinarily relevant* in determining whether a sentence should be outside the applicable guideline range may be relevant to this determination if such characteristic or circumstance is present to an unusual degree and distinguishes the case from the "heartland" cases covered by the guidelines in a way that is important to the statutory purposes of sentencing.

U.S.S.G. § 5K2.0 (1997) (emphasis added). Thus, if a factor is "discouraged," as opposed to "prohibited," the district court may rely on it when making a decision to depart downward. *Koon*, 518 U.S. at 95-96. In addition, if a factor is "unmentioned" by the sentencing guidelines, "the court must, after considering the 'structure and theory of both relevant individual guidelines and the Guidelines taken as a whole,' decide whether it is sufficient to take the case out of the Guideline's heartland." *Id.*

Every circuit to examine the issue has held that civil forfeiture may not be used as a basis for departure from the sentencing guidelines. *See United States v. Shirk*, 981 F.2d 1382, 1397 (3d Cir. 1992), *vacated on other grounds*, 510 U.S. 1068 (1994); *United States v. Weinberger*, 91 F.3d 642,

644-45 (4th Cir. 1996); *United States v. Hendrickson*, 22 F.3d 170, 175-76 (7th Cir. 1994); *United States v. Crook*, 9 F.3d 1422, 1425-26 (9th Cir. 1993); *United States v. Hoffer*, 129 F.3d 1196, 1203 (11th Cir. 1997). These courts rely on the fact that the guidelines treat civil forfeiture as a wholly separate sanction that is to be imposed in addition to, and not in lieu of, imprisonment. *See Hoffer*, 129 F.3d at 1203; U.S.S.G. § 5E1.4 ("Forfeiture is to be imposed upon a convicted defendant as provided by statute."). In addition, the guidelines contemplate civil forfeiture as a relevant factor when setting or reducing applicable fines, but make no such mention of the factor in the departure context. *See* U.S.S.G. § 5E1.2(d)(5). We thus hold that civil forfeiture is an impermissible factor on which to base a downward departure.

Second, the court mentioned the fact that Nichols had been an upstanding citizen. The sentencing guidelines classify civic and charitable good works and a defendant's community ties as "discouraged" factors in deciding whether to depart from the guideline range. *See* U.S.S.G. § § 5H1.6, p.s., 5H1.11, p.s. Thus, the court may depart only "if that factor is present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present." *Koon*, 518 U.S. at 96. Whether such exceptional circumstances exist here cannot be discerned from the sentencing colloquy because the district court did not elaborate on Nichols's civic good works or community ties. We therefore conclude that this factor does not justify the downward departure in this case.

Finally, the district court relied most heavily on the disparity between Nichols's guideline range and that of his

co-defendants. The court noted that Nichols's guideline range was significantly higher than his co-defendants' because 1) he made a larger "investment" in the traded stock and 2) at least two of his co-defendants received downward adjustments for substantial assistance to the authorities under section 5K1.1.

The government argues that the sentencing disparities result from a straightforward application of the sentencing guidelines, which contemplate different sentences based on different individual facts. For instance, Nichols's guideline range was higher than the ranges of his co-defendants because Nichols profited from the insider trading more than any other co-defendant. Because Nichols made $230,475, his offense level was increased by 8 levels. U.S.S.G. § 2F1.1(b)(1)(I) (for gain over $200,000, add 8 levels). In addition, one co-defendant received a downward adjustment for the substantial assistance he provided to the government; the guidelines specifically reward such assistance with a two-level downward adjustment. U.S.S.G. § 5K1.1. Nichols was not asked to and did not provide such assistance. Thus, the government argues, the guidelines have already contemplated sentence disparities resulting from both differing amounts of unlawful profit and differing levels of assistance to the government among co-defendants.

Nichols relies on *United States v. Wright*, 211 F.3d 233 (5th Cir. 2000), for the proposition that district courts may consider sentencing disparities between co-conspirators when deciding whether to depart from the guidelines. We noted in *Wright* that, after *Koon*, categorical rejection of departure factors was improper. *Id.* at 238. As the district court in *Wright*

did not believe it could rely on sentence disparities, we remanded for re-sentencing. *Wright*, 211 F.3d at 239.

Yet *Wright* represents our only post-*Koon* decision dealing with the sentence disparity factor, and offers no guidance as to the circumstances in which a departure may be based on such a disparity. Thus, it is helpful to look at decisions outside this circuit. For example, the Seventh Circuit has distinguished between "justified" and "unjustified" disparities and noted that only "unjustified" disparities could support a decision to depart from the guidelines. *United States v. Meza*, 127 F.3d 545, 549 (7th Cir. 1997). The *Meza* court defined "justified" disparities—those that may "never be a basis for departure"—as those "result[ing] from the proper application of the Guidelines to the particular circumstances of a case." *Id.* It noted that disparate sentences resulting from acceptance of a plea agreement or adjustment under section 5K1.1 are examples of "justified" disparities. *Id.*

In the present case, the disparity results entirely from "the proper application of the Guidelines to the particular circumstances of [the] case," as discussed *supra*. The disparity cannot form the basis of the district court's decision to depart because it results from factors already taken into consideration by the sentencing guidelines.

In sum, none of the reasons given by the district court in its sentencing colloquy justifies the decision to depart from the guidelines.

III

For the foregoing reasons, Nichols's sentence is VACATED, and the case is REMANDED for resentencing in a manner consistent with this opinion.[3]

VACATED and REMANDED.

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3. Under the PROTECT Act, the district court "shall not impose a sentence outside the applicable guidelines range except upon a ground that . . . was specifically and affirmatively included in the written statement of reasons required by section 3553(c) in connection with the previous sentencing of the defendant prior to the appeal." 18 U.S.C. § 3742(g)(2)(A). Because the district court failed to provide a written statement of reasons, it is precluded from departing from the sentencing guidelines on remand.

APPENDIX B — EXCERPTS FROM SENTENCING COLLOQUY OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, LAFAYETTE DIVISION DATED NOVEMBER 3, 2003

[Commencing at page 4]

* * *

Does the defendant have anything to say or offer in mitigation of punishment before sentencing is imposed?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Mr. Nichols.

THE DEFENDANT: I wish to apologize to the Court for my actions. I pled guilty because I committed the crimes of which I was accused. I deeply regret the hurt that I have caused to my family and my friends and myself.

THE COURT: Mr. Skinner?

MR. SKINNER: Yes, Your Honor. Just briefly. We have previously submitted a presentence memorandum. I know the Court has read that.

Mr. Nichols made a mistake, and he has freely admitted that mistake. He has already suffered very harsh consequences as a result of that mistake of which the Court is aware, including a payment in the SEC matter of roughly $800,000. He is additionally now facing discipline by the State Supreme Court.

We ask the Court in reaching this sentence to put this isolated incident of misconduct in the context of Mr. Nichols' entire life which has been a law-abiding life, a life of giving freely of himself, of his time, of his resources to others less fortunate; a life of doing the right thing for the right reason without any thought [5] whatsoever of personal recognition or gain including making a very substantial contribution to the NAACP's educational stabilization program which benefits children with disciplinary and educational problems; as well as a life dedicated to his family.

If any matter cries out for a downward departure, this one does. It's an isolated incident. He has cooperated fully both with the civil authorities, with the attorney disciplinary authorities, and in the criminal investigation. And there is also the possibility -- there is also the reason of the disparity in sentences between himself and his co-defendants.

So we request respectfully a downward departure and leniency from the Court. Thank you.

THE COURT: Okay.

MR. WALKER: May I respond, Your Honor?

THE COURT: Briefly.

MR. WALKER: Your Honor, the defense has asked for a downward departure and the defense has basically requested a downward departure and he basically has said that he believes that's the right thing to do based on this person's life.

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The law, however, requires that there are only special circumstances under which a person can receive a downward departure. The defense focuses on the fact -- in [6] his memorandum on the fact that he has a lack of criminal history. Well, the guidelines took that into account because his criminal history category is zero. He focused on the fact that he had family members in need of care. Well, look at *U.S. v Brown* which is a Fifth Circuit case. They say that's not a basis for a downward departure. That's 29 F3d 953. His reputation in the community, again, that's not a basis for a downward departure. That is *U.S. v O'Brien*, 950 F2d 969.

He looked to the fact that there is a disparity in sentencing. Well, this case is analogous to a dope case in that when one is going to sentence somebody on a dope case, if you have one guy who distributes a kilo of cocaine and guy who distributes an ounce of cocaine, the guy that distributes an ounce of cocaine under the guidelines is going to receive a lesser guideline than the guy who distributes a kilo.

It happens in this case that the defendant purchased more stock and made more money. As a result of that, the guidelines are naturally going to be higher for him than they are for a person who made much less money. And if you read the --

THE COURT: What if they had lost money, Mr. Walker? You know, you are trying to compare this to a dope case. This has nothing to do with a dope case. I [7] mean, this is not nearly as severe as somebody selling cocaine or other illegal drugs or a lot of the other cases involving criminal defendants that come before this Court.

Would you acknowledge that?

MR. WALKER: I will acknowledge that. However, under the guidelines if he had lost money under this -- if he had gone and invested money, as other people I suppose have done, and he had lost money, when they did the guideline calculation, the guideline calculation would have come out and his guidelines would have been lower.

If he had invested money and he had only made $20,000 rather than over $100,000, his guideline would have been lower because the guidelines take into account the amount of profit that you receive as a result of the criminal activity.

THE COURT: Did the guideline take into account the disgorgement, the fact that he paid --

MR. WALKER: No.

THE COURT: -- $794,777.01 in disgorgement back to the federal government, which is, what, five times the amount of money that he made in this case?

MR. WALKER: They do not, Your Honor, and properly they do not. And the reason they don't take that into account is because of the fact that there are cases out there, extraordinary acceptance of responsibility cases, [8] where a person does an illegal conduct and then he comes right back and says, wait, I messed up and pays them back. That is one set of circumstances.

In this circumstance, he made that money. The SEC came to him and said, we got you, and this is where we're going. And he paid it back as a result of that civil case between he and the SEC. He did it voluntarily. I'm not trying to suggest that he didn't do it voluntarily. But the guidelines, the way the guidelines are drafted -- and I believe quite properly so -- under those circumstances his disgorgement of money is not a proper basis for a reduction in the sentence.

THE COURT: You don't think that's even something the Court should take into consideration?

MR. WALKER: Absolutely you should take it into consideration. You have two things you have to decide here. You have to decide, one, if the guy should receive --

THE COURT: Calm down, Mr. Walker. You are the only one excited in this courtroom.

MR. WALKER: I'm having a ball. I love talking, you know that, and I always talk fast.

There are two things you got to make a decision on. You got to make a decision on where his sentence should fall within the guidelines. You have to decide what fine, if any, he is going to pay. And based on this motion you [9] have to decide if there is a downward departure.

The fact that he was disgorged of that money -- love that word, by the way -- perhaps the Court would say, well, under those circumstances I shouldn't give any fine to him, just as you've done with the co-defendants. That would not be an

unreasonable assessment on the Court's part based on the fact that he has already paid that money.

You also might say that, okay, I've got a guideline range and I'm going to give it between the high and the low of the guideline range. Perhaps I'll give him a lower level within the guideline range based on the fact that he paid that money back or that he paid it in that civil proceeding.

But it's not a basis for a downward departure, and the defense is asking for a downward departure. And there is -- and I searched it, and I know that Mr. Skinner searched it because he used to be my boss a long time ago and he is not one that doesn't -- if he could find a case out there, he would have cited it.

There is not one case out there in which a person is allowed to have a downward departure based on the fact that he had disgorged a certain amount of money in a civil case. And, in fact, I have had a number of cases -- the Jody Feldman case is one that jumps into my head -- where I prosecuted a guy criminally. The SEC did exactly the same [10] thing that they did in this case. They came up and said, this is a big SEC violation and they fined the heck out of him. But his civil fine was not something that they used to lower his criminal sentence because it just -- it -- I hate to quote Judge Doherty, but she always says things are apples and oranges, and basically they are apples and oranges.

In this case that civil disgorgement are oranges and his criminal sentence are apples.

THE COURT: And I'm not saying that is something that should be used for a downward departure. I'm asking you if that is something the Court should take into consideration with all the other factors. Before you got too excited, I simply asked you is that something the Court should take into consideration.

MR. WALKER: Absolutely in determining his sentence.

THE COURT: Okay.

* * *

[13] * * *

THE COURT: All right. The applicable offense level is 13. The criminal history is Category I. The applicable guideline range is 12 to 18 months of imprisonment. Probation is not applicable. Two to three years of supervised release. A fine of between $3,000 and $30,000. Restitution is not applicable. A mandatory assessment of $100 is required pursuant to 18 USC, Section 3013.

The reasons for these guideline determinations are set forth in the presentence report and are reasonable under these conditions and under these circumstances.

The defendant has filed a motion for a downward departure to which the government has responded. The Court has considered all of the information submitted and finds that there are grounds for departure in this matter based on the information submitted by the defendant.

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The Court will take at least into consideration -- maybe not as to the downward departure, but in the totality of the circumstances, the fact that Mr. Nichols has paid $794,777.01 in penalties and disgorgement and interest to the government. This is a significant amount of money over and above any profit that he did receive in this matter.

[14] Secondly -- and I guess this is why judges have problems with the sentencing guidelines. It does -- the guidelines do not take into account the fact that this individual has in fact been an upstanding citizen of this community. It's -- that's not a single thing to consider by the Court, and this Court has in fact had other defendants before it that also were exemplary individuals in the community. But in the totality of the circumstances in this case, the Court has to take that into consideration. And based on the type of situation that we're involved in, this Court must take that also into consideration.

The real consideration, however, the true consideration in the downward departure in this matter is in fact the disparity in the sentencings in this case. The fact that Mr. Nichols made more of a profit than the others, he has paid for that absolutely positively through the nose. That's not a legal term, but that's the reality that has happened in this case. He has paid through the nose and has paid much more money back than he made in this case.

And the fact that he is being penalized because he made somewhat of a larger investment -- and not a great deal, larger investment than some of the others -- throws him over a guideline sentence that is out of line under these

circumstances in this particular case. It is out of line with what common sense would tell anyone to do under [15] the circumstances.

The Court has to take into consideration the fact that the other individuals, at least the first two that the Court has sentenced, one in fact the government has filed a 5K1 on who is more culpable than this defendant. The fact that he cooperated gave this Court an opportunity, as they do with any individual who cooperates and the government acknowledges that cooperation, to give them a lesser sentence. And that is what this Court did.

But in order to balance someone -- in order to balance this situation pertaining to sentencing, this Court almost feels obliged to downwardly depart in this particular case.

And I think, taking in the totality of those circumstances, the numerous letters this Court has received pertaining to Mr. Nichols, the disparity in sentencing with the other defendants, this Court is going to downwardly depart.

The Court will impose the following sentence -- although it is not going to downwardly depart a great deal and in fact the sentence the Court intends to give is basically in line with the guidelines that are before the Court.

The Court imposes the following sentence: No imprisonment; five years of probation, which is the highest [16] number of years I can give -- put Mr. Nichols on probation. The defendant shall serve 12 months of the period of probation in home confinement with electronic monitoring

and is to pay all costs of monitoring. This Court will further order that in this case the electronic monitoring -- the home confinement, Mr. Nichols will receive a much more stringent home confinement.

The Court will order that Mr. Nichols only leave his home for the purposes of work, religion, going to religious services, completing community service, and for doctors appointments and any other medical appointments that may be medically necessary, and for appointments with -- obviously with the probation office when he would have to appear before them. Any other requests to leave the home during this 12-month period of time shall come through the probation office to the Court.

The Court will also order the defendant to perform 500 hours of community service work during the period of probation as directed by the probation office. And of course while he is performing this community service, this is the only other reason that he may leave home confinement.

The defendant shall pay the cost of supervision in the amount of $270.59 per month. There is no supervised release. No fine in light of the significant penalties previously paid by the defendant. No restitution. The $100 [17] special assessment pursuant to 18 USC, Section 3013 is due and owing today.

The Court is not -- is suspending the requirement of any drug testing under the 1994 Crime Control Bill. This Court further considers the 12-month home confinement with the restrictions the Court has placed on Mr. Nichols to be

basically in harmony with the guidelines, the low end of the guidelines, which was 12 months.

At this time I wish to advise you, Mr. Nichols, that you have a right to appeal your sentence and/or conviction in this matter. If you are unable to afford the services of an attorney to handle your appeal, counsel will be appointed for you.

Do you understand this?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And do you also understand that if you cannot afford it, a transcript of the record of this case for appeal will be prepared at the government's expense? Do you understand this?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Further you shall report to the U.S. Probation Office for further instructions pertaining to your home arrest.

THE DEFENDANT: Yes, Your Honor.

MR. WALKER: For the record the United States [18] would object to the downward departure.

THE COURT: I expected that, Mr. Walker.

MR. WALKER: I knew you would.

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THE COURT: Even as passionate as you were in your plea, I expected that.

This Court needs to also, for the record, state that the Court, in reviewing the *United States versus Wright*, which is under 2311 Fad 233, a Fifth Circuit case in 2000, it thinks that this case in fact falls in line with that particular case which would allow a departure under the circumstances with this defendant as well as the case of the *Koons* case, *Koons versus United States*, 518 U.S. 81, which is a 1996 case.

Anything else, gentlemen?

MR. SKINNER: No. Thank you, Your Honor.

THE COURT: Thank you.

(Proceedings adjourned.)

* * * *

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING FILED AUGUST 18, 2004

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 03-31133

UNITED STATES OF AMERICA,

Plaintiff - Appellant

v.

LOGAN L. NICHOLS,

Defendant - Appellee

Appeal from the United States District Court for the Western District of Louisiana, Lafayette

ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion 07/02/04, 5 Cir., _____, _____ F.3d _____)

Before JOLLY, DAVIS and JONES, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En

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Banc, (FED. R. APP. P. AND 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

ENTERED FOR THE COURT:

s/ E. Grady Jolly
United States Circuit Judge